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16 UNITED STATES DISTRICT COURT  
17 SOUTHERN DISTRICT OF CALIFORNIA

18  
19 JANELL ERICKSON, an individual, } Civil No.:13-CV-1210 NLS  
LYNDA TREMAIN, an individual, an } [Assigned for all purposes to Judge Nita  
individual, NAOMI GRIMM, an } L. Stormes]  
individual on behalf of themselves, and }  
all persons similarly situated, }  
21 Plaintiffs, } CLASS ACTION  
22 v. }  
23 OLD REPUBLIC TITLE COMPANY, } JOINT MOTION FOR  
and DOES 1-50, inclusive, } DETERMINATION OF  
24 } APPROPRIATE RELIEF FOR  
25 Defendants. } VIOLATION OF COURT'S  
} SEPTEMBER 9, 2013 ORDER, FOR A  
} PROTECTIVE ORDER  
} CONCERNING PLAINTIFFS'  
} NOTICES OF DEPOSITIONS, AND  
} STAY OF DEPOSITIONS PENDING  
} DISPOSITION OF MOTION FOR  
} PROTECTIVE ORDER  
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JOINT MOTION FOR DETERMINATION OF APPROPRIATE RELIEF FOR VIOLATION OF  
COURT'S SEPTEMBER 9, 2013 ORDER

1 This Joint Motion is filed without a scheduled hearing date pursuant to Local  
 2 Civil Rule 7.2 (b) and the Court's Civil Case Procedures Regarding Discovery  
 3 Disputes. Because Plaintiffs and Defendants (the "Parties") do not agree on the  
 4 content of the requested order, no jointly proposed order is submitted herewith.  
 5 The Parties jointly request the Court determine the appropriate relief in connection  
 6 with Defendants' acknowledged violation of the Court's September 9, 2013 Order  
 7 Granting Motion for Preliminary Approval of Settlement in the instant class and  
 8 collective action ("Preliminary Approval Order") (Dkt. No. 20) and Defendants'  
 9 belief that Plaintiffs' Counsel has also violated the Preliminary Approval Order,  
 10 including a protective order not to permit Plaintiffs' Counsel to take nine (9)  
 11 depositions that are presently scheduled on October 31, and November 1, 2013 and  
 12 a stay of those depositions pending the Court's ruling on the motion for protective  
 13 order.<sup>1</sup>

14

15 **I. DEFENDANTS' INTRODUCTION AND STATEMENT OF**  
 16 **FACTS**

17 A. Preliminary Approval Order and the October 1 Dosa Email  
 18 The pertinent provision of the Preliminary Approval Order at p. 23:17-25 states:  
 19

20 If a Settlement Class Member contacts Plaintiffs, Plaintiffs' Counsel,  
 21 Defendant or Defendant's Counsel about the Settlement, each of the  
 22 above shall instruct the Settlement Class Member to call the  
 23 Settlement Class Administrator. Defendant is authorized to engage in  
 24 other communications with Settlement Class Members within the  
 normal course of its business. Additionally, the Court finds that the

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26 <sup>1</sup> On October 25, Plaintiffs filed a Joint Motion (Docket No. 28) with Defendants'  
 27 Counsel electronic signature, which Defendants' Counsel did not authorize.  
 28 Declaration of Robert W. Biederman ("Biederman Decl.") at p.5:7-16. After being  
 notified, Plaintiffs agreed to withdraw it, but did not so, Defendants filed a  
 Withdrawal on October 25 (Docket No. 29).

1 protocol for Plaintiffs' Counsel's communications with Settlement  
 2 Class Members in the form of Plaintiffs' Counsel's Letter is fair and  
 3 reasonable. The Parties, Plaintiffs' Counsel, or Defendant's Counsel  
 4 shall not discourage any Settlement Class Member from participating  
 in the Settlement.

5 Pursuant to the Preliminary Approval Order, on September 30, 2013, the  
 6 Settlement Class Administrator sent the Class Notice Package to 1,225 Settlement  
 7 Class Members. Biederman Dec. at p. 1:16-19; Exhibit 1 thereto. On October 1,  
 8 2013, Rick Dosa, Corporate Counsel for Defendants, sent an email to management  
 9 personnel including regional managers, county managers, escrow operation  
 10 managers, and branch managers instructing them not to have communications with  
 11 Settlement Class Members. Declaration of Rick Dosa ("Dosa Dec.") at p. 1:10-21;  
 12 Exhibit 1 thereto ("Dosa 10/1/13 Email").

13 As of October 24, 2013, there have been no objections to the proposed  
 14 Settlement and three opt-outs. Biederman Dec. at p. 5:21-23. Additionally, on  
 15 September 30, 2013, pursuant to the Class Action Fairness Act ("CAFA"), 28  
 16 U.S.C. § 1711 et seq. Defendants served the California Labor Commissioner, the  
 17 United States Attorney, and twelve (12) State Attorney Generals with the required  
 18 notice, and no objections or inquiries have been received. *Id.* at p. 5: 23-6:2 and  
 19 Ex. 3 thereto.

20                   B. Plaintiffs' Counsel's October 16 Call to Defendants' Counsel

21 On October 16, 2013, Plaintiffs' Counsel Nicholas ("Butch") Wagner  
 22 contacted Defendants' Counsel Nick Boodrookas and Robert W. Biederman and  
 23 informed them that at the South Lake Tahoe Office there had been a meeting on  
 24 October 10 attended by the escrow employees and branch manager at that office,  
 25 and the county manager, assistant county manager, and escrow operations manager  
 26 for El Dorado County.<sup>2</sup> Biederman Dec. at p. 1:20-p. 2:3. Plaintiffs' Counsel told  
 27

28 <sup>2</sup> For Placer, El Dorado and Sacramento Counties, Karen Campbell is county

1 Defendants' Counsel that one or more of Defendants' management employees  
 2 stated that the escrow employees should participate in the Settlement and receive  
 3 the money and not opt-out, and if they opted-out they would receive next to  
 4 nothing. Biederman Dec. at p. 2:1-3. This was the first time either Defendants'  
 5 Counsel or Defendants' Corporate Counsel had heard of this event. Biederman  
 6 Dec. at p. 2:5; Dosa Dec. at p. 1:25-p. 2:1.

7       C.     Plaintiffs' Counsel's Violation of the October 3, 2013 Order

8       Plaintiffs' Counsel initiated a contact with Settlement Class Member Jenny  
 9 Lane on October 7 by going to the South Lake Tahoe office to meet with her to  
 10 talk about Defendants and attempted to obtain from Ms. Lane contact information  
 11 for Settlement Class Members. *See* Declaration of Candy Clymer ("Clymer Dec.")  
 12 at p. 2:16-3:6. This communication was in direct violation of the October 3, 2013,  
 13 Order [Dkt. No. 27] that rejected Plaintiffs' request to initiate communications  
 14 with Settlement Class Members through independent sources. Not only has  
 15 Plaintiffs' Counsel impermissibly contacted a Settlement Class Member, but he  
 16 compounded that violation by attempting to obtain information from Ms. Lane to  
 17 contact other Settlement Class Members. Plaintiffs' Counsel then contacted Ms.  
 18 Lane by telephone on October 17. *Ibid.*

20       Plaintiffs' objection to the above statements as hearsay should be overruled  
 21 for several reasons. First, assuming the above statements are hearsay and not  
 22 subject to any applicable exception, pursuant to Fed. R. Civ. P. 43(c) this Court can  
 23 consider hearsay testimony. *See, e.g., LaPorte v. U.S.*, 300 F.2d 878, 882, n. 20  
 24 (1962) ("Under its counterpart in the Federal Rules of Civil Procedure, Rule 43(c),

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26 manager; Teresa Johns is Sales Manager and Assistant County Manager; and  
 27 Phyllis Bianchetti is Escrow Operations Manager. Declarations of Karen  
 28 Campbell ("Campbell Dec."), Teresa Johns ("Johns Dec."), and Phyllis Bianchetti  
 ("Bianchetti Dec.").

1 28 U.S.C., it has been held that the district court may in its discretion admit  
 2 hearsay evidence if satisfied that reasonable standards of necessity and  
 3 trustworthiness are met.”); *Forsberg v. Pefanis*, 261 F.R.D. 694, 700 (N.D. Ga.  
 4 2009) (“Rule 43(c) allows a court to consider hearsay in the form of affidavits and  
 5 depositions when deciding a motion within its scope . . . .”) (cit. omitted).

6 Second, the statements are admissible under the Federal Rules of Evidence.  
 7 Double hearsay or “hearsay within hearsay” is admissible “if each part of the  
 8 combined statement conforms with an exception to the rule.” Fed. R. Ev. 805. The  
 9 first part – Mr. Wagner’s statement to Ms. Lane – is not even hearsay, because it is  
 10 an opposing party’s statement pursuant to Fed. R. Civ. P. 801(d)(2). The October  
 11 3, 2013 Order is directed towards Plaintiffs’ Counsel and this statement manifests a  
 12 violation of the Order. Moreover, it is not hearsay, because it is a “legally  
 13 operative act”; namely, the violation of the October 3 Order. *See, e.g., Hillside*  
 14 *Productions, Inc. v. County of Macomb*, Case No. 06-CV-11566, 2007 WL  
 15 3275113 at n. 10 (“legally operative act is admissible”). The second part of the  
 16 statement from Ms. Lane to Ms. Clymer falls within the residual exception to  
 17 hearsay under Fed. R. Civ. P. 807. The Court has “a fair degree of latitude” to  
 18 admit evidence under this section. *See, e.g., U.S. v. Valdez-Soto*, 31 F.3d 1467,  
 19 1471 (9<sup>th</sup> Cir. 1994). Because Defendants are barred from talking with Settlement  
 20 Class Member Lane, this is the only way that this testimony can be adduced, and  
 21 such testimony is reliable and trustworthy because Plaintiffs’ Counsel has engaged  
 22 in virtually the identical conduct with this same individual in another case  
 23 involving a different title company. *See, e.g., Flick v. Bank of America*, 197 F.  
 24 Supp. 2d 1229, 1230 (D. Nev. 2002) (court admitted affidavits from two friends of  
 25 Plaintiffs under Fed. R. Civ. P. 807 who were unavailable); *Burda v. Fidelity*  
 26 *National Management Service, LLC*, Case No. SACV 11-00247-JVS (C.D. Cal.  
 27  
 28

1 November 5, 2012) (Exhibit 1 hereto), slip opinion at 4-5 (improper conduct of  
 2 Mr. Wagner by providing Ms. Jenny Lane list of class members to verify  
 3 information).<sup>3</sup>

4       D. Defendants' Acknowledgement of South Lake Tahoe Meeting  
 5       and Other Meetings in Placer, El Dorado, and Sacramento  
 6       Counties

7       Defendants acknowledge that they have violated the above-quoted provision  
 8 of the Preliminary Approval Order by initiating communications with Settlement  
 9 Class Members about the Settlement at the following offices in Placer, El Dorado,  
 10 and Sacramento counties on the following dates and involving the following  
 11 management personnel and Settlement Class Members:

<b>Office</b>	<b>Date</b>	<b>Management Personnel Present</b>	<b>No. of Settlement Class Members Present</b>
2227 Fair Oaks Blvd., Sacramento	10/3/13	Phyllis Bianchetti Teresa Johns	3 Escrow officers ("EO") 1 Escrow assistant ("EA") <sup>4</sup>
2365 Iron Point Road, Folsom	10/3/13	Phyllis Bianchetti Teresa Johns Denise Leath (branch manager)	3 EOs 3 EAs
1512 Eureka Road, Roseville	10/4/13	Teresa Johns Cathy Rutter (branch manager)	2 EOs 4 EAs

23  
 24  
 25       <sup>3</sup> Plaintiffs' Counsel's statement that he cannot rebut the statements by Ms. Lane  
 26 due to the attorney-client privilege is incorrect. The privilege belongs to client  
 27 Lane who has waived it by talking to third-party Candy Clymer.

28       <sup>4</sup> At the meetings, there were also account executives who are sales representatives  
 and are not Settlement Class Members.

1 925 10/4/13 Teresa Johns 2 EO  
 2 Highland Pointe, Faith Palmer 4 EA  
 3 Roseville CA (branch manager)

4 200 Auburn 10/4/13 Teresa Johns 2 EO  
 5 Folsom Teri Tait Wilson 3 EA  
 6 Road, (branch manager)  
 7 Auburn CA

8 2482 10/10/13 Karen Campbell 1 EO  
 9 Lake Tahoe Teresa Johns 3 EA  
 10 Blvd., South Lake Phyllis Bianchetti  
 11 Tahoe Candy Clymer  
 (branch manager)

12 Johns Dec. at p. 1:21-p.2:23. All of the above meetings were routine monthly  
 13 sessions referred to as “Goals” meetings, the principal purpose of which is to  
 14 discuss the prior months’ productivity (open and closed escrow orders, revenues,  
 15 and expenses) and the goals for the following month. Johns Dec., at p. 1:9-20.  
 16 Additionally, at these meetings, Escrow Operations Manager Bianchetti discusses  
 17 any updated escrow practices, which she refers to as “Hot Topics,” that are  
 18 distributed in writing to those employees present. Johns Dec. at p. 1:9-20; 3:1-8;  
 19 Bianchetti Dec., at p. 1: 9-24; and Exh. 1 thereto. All meetings other than the  
 20 South Lake Tahoe meeting lasted about 20 to 30 minutes. The South Lake Tahoe  
 21 meeting first involved a lunch provided by Old Republic and lasted about one  
 22 hour. Johns Dec. at p. 2:24-26.

23 Defendants’ very brief statements at the above meetings about the  
 24 Settlement were as follows:

25 • Defendants are not allowed to talk about the Settlement.

- 1     • The Settlement Class Member can opt-out or opt-in, but whatever he or
- 2         she does will not reflect badly on his or her employment with
- 3         Defendants.
- 4     • The greater participation of Settlement Class Members will reduce the
- 5         amount the other participants will receive.

6     Johns Dec., at p. 3:8-18; p. 4:8-11; Bianchetti Dec., at p. 1:25:p. 2:9; Campbell  
 7     Dec., at p. 1: 23-p.2:2; Clymer Dec. at p. 1:24-27.

8           While the statements are consistent with the terms of the Settlement,  
 9     Defendants acknowledge these communications never should have taken place,  
 10    and are contrary to the Preliminary Approval Order and the Dosa 10/01/13 Email.  
 11    The apparent explanation for the above statements, which were made by Escrow  
 12    Operations Manager Bianchetti and Assistant County Manager and Sales Manager  
 13    Johns is as follows:

14        • Ms. Johns has explained that she was not informed by Ms. Campbell  
 15    (who was on vacation when she received the Dosa 10/01/13 Email) or Ms.  
 16    Bianchetti of the Dosa 10/01/13 Email, and generally repeated what Ms. Bianchetti  
 17    had stated at the Sierra Hills and Folsom meetings on October 3. Johns Dec. at p.  
 18    3:19-22; Campbell Dec. at p. 1:23-24.

19        • While Ms. Bianchetti had received the Dosa 10/01/13 Email and  
 20    understood that she was not to talk about the Settlement, she mistakenly concluded  
 21    that she could state that the Settlement Class Member's decision to participate or  
 22    not participate in the Settlement would have no effect on their employment in order  
 23    to assure them about their job security. Bianchetti Dec. at p.2:23-p. 3:4

24           E. The Communications In Other Counties

25           The county managers in Defendants' operations in other counties have stated  
 26    that they understand the protocol set forth in the Dosa 10/01/13 Email. *See*  
 27    Declarations of Jackye Chai, Ernie Collins, John Geraci, Dee Ann Lambert,  
 28    Tiffany Diede, Brenda Donath, Kathy Fenoglio, Mark Gamba, Jayne Silveira,

1 Cochelle Collins, Ginger Frankel, Katherine Handley, Heidi McDonald, John  
 2 Pasco, and Greg DeMartini. Some of the county managers had been contacted by  
 3 a Settlement Class Member, and in accordance with the Preliminary Approval  
 4 Order and the Dosa 10/01/13 Email, they did not discuss the Settlement. *Ibid.*

5 F. The Dosa October 18, 2013 Email

6 Corporate Counsel Dosa sent another email stressing mandatory compliance  
 7 with the Preliminary Approval Order. Dosa Dec., at p. 2:7-12; Exhibit 2 thereto.

8 G. Plaintiffs' Counsel's Proposal and Notices of Deposition and  
 Subpoenas

9 On October 17, Plaintiffs' Counsel notified Defendants' Counsel that it  
 10 intended to issue notices of deposition for the participants in the South Lake Tahoe  
 11 meeting. Biederman Dec. at p. 2:6-16. Plaintiffs' Counsel then indicated that it  
 12 hoped to resolve this matter so that depositions would be unnecessary. *Ibid.*  
 13 Specifically, Plaintiffs' Counsel suggested that Defendants allow Plaintiffs'  
 14 Counsel to engage in the conduct that was subject of the Joint Motion to Clarify  
 15 and that the Court did not permit in its October 3, 2013 Order (Dkt. No. 27), and  
 16 that if Defendants agreed then this entire matter would not have to be brought to  
 17 the Court's attention. *Ibid.*<sup>5</sup>

18 H. Defendants' Counsel's Response

19 On Monday, October 21, Defendants' Counsel told Plaintiffs' Counsel that  
 20 Defendants did not accept Plaintiffs' Counsel's proposal. Biederman Dec. at p.  
 21

22 <sup>5</sup> On October 18, Plaintiffs' Counsel issued the Notices of Deposition of 9  
 23 individuals for October 30 and 31, 2013, which includes four (4) Settlement Class  
 24 Members, Ms. Johns, Bianchetti, Clymer, and Campbell as well as a non-Class  
 25 Member who is a marketing or sales representative. Biederman Dec. at p. 2:17-26;  
 26 Ex. 2 thereto. Despite the unavailability of Messrs. Boodrookas and Biederman  
 27 (the only counsel appearing and working on this case), for depositions on October  
 28 30, and proposing alternate dates of October 31 and November 1 or November 4 or  
 5, no agreement was reached to change the current schedule. Biederman Dec. at p.  
 4:18-5:8.

1 3:1-p. 3:13. Rather, Defendants' Counsel stated this matter should be brought to  
 2 the Court's attention; Defendants acknowledged their violation of the Court's  
 3 Preliminary Approval Order; in light of Defendants' admission of this violation  
 4 there was no need to take depositions as to what occurred and to take depositions  
 5 would circumvent the Court's October 3, 2013 Order concerning Plaintiffs'  
 6 Counsel's communications with Settlement Class Members. *Ibid.* While  
 7 Defendants' Counsel did not believe there has been violation of the Preliminary  
 8 Approval Order outside of Placer, El Dorado, and Sacramento counties,  
 9 Defendants' Counsel proposed that a joint letter be sent to all Settlement Class  
 10 Members to be approved by the Court in the form attached as Exhibit 3 to  
 11 Biederman Dec. *Ibid.*

12 Plaintiffs' Counsel responded by suggesting that the parties enter into and  
 13 file a Stipulation permitting the communications that the Court held were not  
 14 permissible in the October 3, 2013 Order (Dkt. No. 27). Biederman Dec. at p.  
 15 3:15-19. When Defendants' Counsel rejected this proposal, Plaintiffs' Counsel  
 16 agreed to make a joint motion but not to withdraw the depositions. *Id.* at p. 3:20-  
 17 28. Accordingly, after meeting and conferring, Plaintiffs and Defendants reached  
 18 an impasse as to whether the 9 depositions should proceed and Defendants  
 19 therefore seek a protective order against taking the depositions. *Ibid.*

20       II.     **DEFENDANTS' POSITION**

21       A.     **A Joint Letter Should Be Sent**

22 Defendants submit that the best means to correct both Defendants' and  
 23 Plaintiffs' Counsel's improper communication is to send a joint letter focusing on  
 24 the following points:

25       • Plaintiffs, Plaintiffs' Counsel, Defendants and Defendants' Counsel are  
 26           to have no communications with the Settlement Class Members about the  
 27           Settlement and if contacted are to refer all inquiries to the Settlement  
 28           Class Administrator.

- 1     • If a Settlement Class Member has a question, he or she should contact the
- 2         Settlement Class Administrator at (877) 283-1772 about the terms of the
- 3         Settlement and any options concerning participation.
- 4     • A summary of the terms of the Settlement are set forth in the Notice of
- 5         Settlement of Class Action. The Settlement Class Member should rely
- 6         on what is stated in the Settlement and Notice.

7 Biederman Dec., at p. 6:4-6; Ex. 4 thereto.

8           While there is no indication that Defendants have initiated or engaged in  
 9         communications about the Settlement outside of Placer, El Dorado, or Sacramento  
 10        counties, Defendants believe the above correspondence should be sent to all  
 11        Settlement Class Members to assure that there is a uniform communication to all  
 12        Settlement Class Members. This uniform prophylactic written communication will  
 13        best address any mistaken communications. Defendants will pay the costs of  
 14        sending the proposed Joint Letter, which will not be deducted from the \$12 million  
 15        total settlement fund. Biederman Dec. at p. 6:4-6.

16           B.     The Court Should Issue a Protective Order Not To Allow  
 17                   Plaintiffs' Counsel to Take Nine (9) Depositions

18           Defendants have acknowledged their violation of the Preliminary Approval  
 19        Order, and do not believe it is necessary to take depositions of specified members  
 20        of Defendants' management, all of whom have candidly acknowledged what  
 21        occurred. Additionally, as to the proposed depositions of Settlement Class  
 22        Members, Defendants' Counsel has never seen a lawyer who has subpoenaed his  
 23        own clients, which is exactly what Plaintiffs' Counsel has done.<sup>6</sup> These  
 24        depositions are an attempt to circumvent the Court's October 3, 2013 Order by

25  
 26        <sup>6</sup> Plaintiffs' Counsel necessarily already contacted one of the Settlement Class  
 27        members, lest how could it have known about the South Lake Tahoe meeting. As  
 28        noted above, even prior to (as well as after) the meeting, Plaintiffs' Counsel had an  
 29        impermissible communication that he initiated with a Settlement Class Member.

1 engaging in communications directly with certain Settlement Class Members,  
 2 albeit under the guise of a subpoena.<sup>7</sup> In short, the proposed depositions will  
 3 merely increase the amount of attorneys' fees and expenses incurred by both sides  
 4 and merely confirm what Defendants have already admitted. The more  
 5 constructive and efficient approach is to immediately address the violation and  
 6 implement a solution that befits this problem in the form of the proposed Joint  
 7 Letter.<sup>8</sup>

8 Moreover, Defendants have already taken measures to re-emphasize  
 9 compliance with the Court's October 3, 2013 Order. Promptly after Plaintiffs'  
 10 Counsel reported the violations on October 18, Defendants sent another email to its  
 11 management personnel which explicitly states that no communications with  
 12 Settlement Class Members should take place, without exception. Dosa Dec, Ex. 2  
 13 thereto.

14       C.     The Court Should Stay the Depositions Pending Ruling on the  
 15       Motion for Protective Order

16       Defendants have attempted to have Plaintiffs' stay the depositions until  
 17 disposition of the Motion to Compel, but Plaintiffs have refused. Accordingly,  
 18 Defendants ask the Court to stay the depositions pending ruling on the Motion to

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21       <sup>7</sup> On October 21, while objecting to any depositions as circumventing this Court's  
 22 October 3, 2013 Order, Defendants' Counsel informed Plaintiffs' Counsel that they  
 23 were unavailable for depositions on October 30 and 31, 2013. Biederman Dec. at  
 24 p. 3:9-13. Subsequently Defendants' Counsel informed Plaintiffs' Counsel that  
 25 October 31 was available, and proposed either October 31 and November 1 or  
 November 4 and 5. The parties, however, were unable to reach an agreement as to  
 changing the dates of the depositions.

26       <sup>8</sup> Alternatively, Defendants request that as stated in Plaintiffs' Position the  
 27 depositions be limited to "to ascertain what exactly was told to various class  
 28 members by Defendants' management and to ascertain what effect Defendant's  
 communications regarding the Proposed Settlement has had on class members."

1 Compel. *See, e.g., Huene v. U.S. Dept. of Treasury*, No. 2:11-cv-2110 JAM (E.D.  
 2 Cal. Jan. 31, 2013) at \*3 (unless deponent obtains a stay pending disposition of  
 3 motion for protective order, the deponent must attend). Should the Court allow the  
 4 depositions to proceed, defendants intend to issue a deposition notice and subpoena  
 5 of Ms. Jenny Lane, as Defendants should be allowed to investigate Plaintiffs'  
 6 counsel's compliance with the Court's October 3 Order.

7

8                   D. There Is No Need to Alter the Terms of the Settlement To  
 9 Permit Plaintiffs' Counsel to Engage In Communications  
Contrary to the Terms of the Settlement

10

11 Plaintiffs' Counsel's suggestion that this Court permit counsel to essentially  
 12 modify the Settlement and Preliminary Approval Order to permit *carte blanche*  
 13 communications with Settlement Class Members is not appropriate. What has  
 14 occurred does not justify changing the terms of the Settlement or revisiting the  
 15 Court's October 3, 2013 Order (Dkt No. 27). The solution to Defendants'  
 16 improper communications should not be to permit Plaintiffs' Counsel's wholesale  
 17 communications that could themselves lead to potential inadvertent misstatements,  
 18 which would only compound the situation. Rather, the Parties negotiated for a  
 19 controlled environment for all communications through the Settlement Class  
 20 Administrator, which controlled environment is working well. As noted above, to  
 21 date, no objections have been received; there are only three (3) opt-outs; and no  
 22 objections or inquiries from the recipients of the CAFA notice. The proposed joint  
 23 letter has the benefit of being a uniform communication to all Settlement Class  
 24 Members as opposed to *ad hoc* communications by Plaintiffs' Counsel with  
 25 random Settlement Class Members. Finally, Defendants' Counsel's concerns about  
 26 Plaintiffs' Counsel's communications with Settlement Class Members is  
 27 highlighted by the fact that Plaintiffs' Counsel contacted and met with a Settlement  
 28 Class Member without first asking this Court to modify its October 3 Order.

1                   E. Defendants Leave it to the Court's Discretion to Issue Any  
 2                   Further Orders or Sanctions

3                   While Defendants believe they took steps to prevent any violation through  
 4                   the Dosa 10/01/13 Email and that there was no malevolent intent to violate the  
 5                   Preliminary Approval Order, Defendants acknowledge the violation occurred and  
 6                   apologize to the Court. Defendants leave it to the Court's discretion to address this  
 7                   situation in the form of any further orders or sanctions.

8                   **III. PLAINTIFFS' POSITION**

9                   Plaintiff seeks the following relief:

10                  (1) The right to communicate with its clients and class members. Good  
                         cause exists for this relief because Defendant's management has  
                         communicated with numerous class members about the settlement and  
                         whether or not to opt out and the consequences for doing so or not doing  
                         so. Furthermore, Plaintiff needs to communicate with its clients to refute  
                         some of the allegations set forth by Defendant in this Joint Motion.

16                  The parties have previously presented a Joint Motion concerning  
 17                  clarification of the Stipulation for Settlement and the Court's Order thereon  
 18                  concerning contact with class members. To a significant extent, this Motion  
 19                  necessarily requires the Court to revisit that issue. One of the reasons Plaintiff has  
 20                  sought the right to communicate with class members is because Defendant has  
 21                  been communicating with class members about the settlement and has instructed  
 22                  class members on whether to opt-out and the consequences for doing so or not  
 23                  doing so. Defendant is the employer of many of the Class Members and has a  
 24                  captive audience in the workplace. Defendant obviously has a significant influence  
 25                  on these class members as a consequence, many of these class members likely to  
 26                  heed the direction of its employer regarding what option to exercise on the

1 proposed settlement. Class Counsel is at an obvious disadvantage in being  
2 restricted from communicating with its clients and class members especially since  
3 Defendant has breached the settlement agreement and the Court's Order previous  
4 communicating with class members about the settlement. Class Counsel seeks the  
5 right to communicate confidentially with its own clients and class members to  
6 attempt to cure any damage that has resulted from such communications by  
7 Defendant's management team and to assure class members that they have a right  
8 to exercise any option they chose concerning the settlement without interference  
9 from their employer.

10 Class Counsel also wishes to take the depositions set forth in the deposition  
11 notice attached as Exhibit 2 to the Biederman declaration in order to ascertain what  
12 exactly was told to various class members by Defendants' management and to  
13 ascertain what effect Defendant's communications regarding the Proposed  
14 Settlement has had on class members.

15 An obvious disadvantage to Plaintiff is illustrated in this Joint Motion.  
16 Defendant has submitted 14 declarations in support of its position while Plaintiff is  
17 unable to submit any declarations (other than the Declaration of Class Counsel)  
18 because class counsel has not been allowed to communicate with class members.  
19 In addition, Defendant's counsel is attempting to prevent class counsel from taking  
20 depositions to ascertain the extent and effect of the Defendant's management  
21 team's communications. As such, at the present time, without permission from the  
22 Court, class counsel cannot present evidence to refute the inaccurate evidence in  
23 the declarations submitted by Defendant. For example, class counsel is currently  
24 prohibited to communicate with its client, Jenny Lane, to obtain evidence to refute  
25 the hearsay and inaccurate statements in the declaration of Candy Clymer. Class  
26 counsel has an attorney-client relationship with Jenny Lane on matters that pre-  
27  
28

1 date the proposed settlement in this case.

2 Class Counsel is presently prohibited from presenting evidence to oppose  
 3 many of the allegations and statements made by Defendant and Defendant's  
 4 declarants in this motion. Class Counsel simply seeks a level playing field.

5 Class counsel wishes to communicate with its clients on the same issues  
 6 which Defendants management team has communicated. Plaintiffs are obviously at  
 7 a tremendous disadvantage given the fact that Defendant is the employer of many  
 8 of the class members and may have already instilled a significant fear in many of  
 9 its employees and class members regarding the proposed settlement. Unless Class  
 10 Counsel has the right to communicate confidentially with its clients, it would be  
 11 impractical to expect that any harm, fear, or misinformation that has been created  
 12 by Defendant's management team will be adequately remedied. Plaintiff is asking  
 13 for fundamental fairness and the right to talk confidentially with its clients about  
 14 the same issues that Defendant's management team has, which Defendant has done  
 15 in violation of the settlement agreement and the Court's previous order.

16 Class counsel has not breached any of the terms of the settlement agreement  
 17 nor has class counsel violated the Court's September 9, 2013 Order. The  
 18 allegations set forth in the declaration of Candy Clymer are based on inaccurate  
 19 and inadmissible hearsay.

21 Due to the fact that Class Counsel has and is litigating other wage and hour  
 22 class actions on behalf of escrow officers, many of the class members in the  
 23 present action are also class members, putative class members, clients, or witnesses  
 24 in other legal matters including other class actions presently being litigated by  
 25 Class Counsel. Currently, class counsel represents several class members in other  
 26 legal matters involving many of the same issues that are present in the current case.  
 27 It is Plaintiff's position that Class Counsel is allowed to exercise its First  
 28 Amendment Constitutional Right and ethical obligations to communicate with its

1 clients about essential legal matters other than the terms of the settlement  
2 agreement in this case. Class Counsel does not construe the Court's Order as  
3 preventing Class counsel from communicating with clients on issues other than the  
4 terms of the settlement agreement in this case.

5  
6 Dated: October 28, 2013

Respectfully submitted,

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9  
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